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89-731

Case No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1989

FRANK ROSENBERG, INC., an Illinois Corporation,

Petitioner,

vs.

TAZEWELL COUNTY, a Body Politic; JERRY APPENZELLER, JAMES CARIUS, JAMES DAWSON, FRED ERTMOED, KENNETH EUBANKS, THOMAS FABRY, ROBERT B. FORSYTH, ROBERT LUTZ, LARRY NOREUIL, WILMA O'DONNELL, and RALPH PALUSKA, Individually, and Members of the Tazewell County Board,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November, 1989

QUESTION PRESENTED

Does a contract seller have standing to bring suit where the actions of a body politic preclude the pending sale of the subject property?

PARTIES

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Frank Rosenberg, Inc., respectfully seeks a Writ of Certiorari to review the Judgment and the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on August 11, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals is scheduled to be reported in the Federal 2d. A copy of the Seventh Circuit Decision appears infra at Appendix A-1.

The District Court rendered its Decision and Order on August 31, 1988. That Order is unreported and appears infra at Appendix A-12.

JURISDICTION

The Court of Appeals entered its Judgment on August 11, 1989. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date, as required by 28 U.S.C. §2101. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides in relevant part:

> The Judicial Power shall extend to all Cases, in Law, and Equity, arising under this Constitution, the Laws of the United States . . .

STATEMENT OF CASE

Frank Rosenberg, Inc. ("Rosenberg"), owns a parcel of real estate in an unincorporated area of Tazewell County, Illinois. Through a series of correspondence, Rosenberg entered into a binding contract with Kirby-Coffman ("Kirby-Coffman") whereby Kirby-Coffman agreed to purchase the land. This contract was conditioned upon Kirby-Coffman's entering into an agreement to construct or participate in the construction of a waste-to-energy facility or other co-generation facility providing steam or energy.

The Illinois Environmental Protection Act, Ill.Rev.Stat. Ch. 111½ ¶1001 et seq., defines the contemplated

type of waste-to-energy facility as a "regional pollution control facility". Section 1021(d) of the Act requires the operator of such a facility to obtain a permit from the Illinois Environmental Protection Agency. Kirby-Coffman, as prospective owner-operator of the waste-to-energy facility complied with the applicable provisions of the Illinois Administrative Code and applied for a permit. Rosenberg though, as holder of legal title to the real estate, also signed the application.

The application was submitted to the County Board as required by the Act. Section 1039.2 directs that a County Board or governing body of the municipality "shall approve" the siting of a pollution control facility if certain criteria are shown.

On July 21, 1986, the Tazewell County Board conducted a hearing where Kirby-Coffman presented both oral testimony and written exhibits that addressed each of the regulatory criteria. This evidence demonstrated that the proposed site passed or exceeded each requirement.

On April 25, the County Board's Executive Committee recommended that the full County Board approve Kirby-Coffman's application. The Board, however, rejected the application by a vote of 14-7. Later on September 25, the County Board reconsidered its vote and again rejected the siting application by a vote of 11-10.

Kirby-Coffman informed Rosenberg that due to the refusal of the County Board to approve location request, Kirby-Coffman was terminating all

activity relative to establishing a waste-to-energy facility on Rosenberg's real estate. Accordingly, the sale from Rosenberg to Kirby-Coffman has not taken place.

The instant case was filed on December 4, 1987, in the Central District of Illinois, Peoria Division. Jurisdiction was premised upon Title 28 U.S.C. §1343, granting district courts original jurisdiction over "any civil action authorized by law to be commenced by any person, laws, or . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or useage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of persons within the jurisdiction of the United

States . . .". The Complaint brought under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §1983 for violation of the civil rights of Frank Rosenberg, Inc., alleges that the Defendants' refusal to approve the site location application had no reasonable basis, was against the manifest weight of the evidence presented to the Board, and was an arbitrary and capricious action that amounted to a confiscation of Plaintiff's property. The Complaint also alleges that the Defendant members of the Tazewell County Board acted in an arbitrary and capricious manner with a deliberate and reckless disregard of the Plaintiff's constitutional rights. The United States District Court entered an order dismissing Rosenberg's Complaint on August 31, 1988. The

ground for dismissal was that Rosenberg had no actionable property interest in the issuance of the site location permit and consequently no standing to bring the instant action.

This Order was appealed to the United States Circuit Court for the Seventh Circuit, and on August 11, 1989, the United States Court of Appeals affirmed the District Court's Order.

REASONS FOR GRANTING THIS PETITION

The issue of a contract beneficiary's enforcement of contract rights adversely affected by the illegal acts of a governmental body has not been addressed by this Court. The First Circuit has, however, considered a case with analogous facts and determined that the plaintiff had standing to bring suit. The Seventh Circuit's decision to

deny Petitioner standing in the instant case is in direct conflict with the First Circuit. The impact of this conflict between the Circuits is to afford or deny judicial relief based solely on the situs of a plaintiff's injury. The import of the resolution of this issue is therefore acute.

It is settled that injury must be sustained before standing can exist. This Court has stated that the basic Constitutional analysis of standing comprises three elements: The plaintiff must allege (1) personal injury, (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 751 (1984). Of the three elements stated in Allen v. Wright, only Petitioner's "personal injury" is disputed.

The Seventh Circuit incorrectly based its decision on a semantic distinction. Since the County Board rejected Kirby-Coffman's application rather than Rosenberg's, the Appellate Court concluded that Rosenberg did not suffer an injury in fact. (A-8) The pleadings, however, establish that Kirby-Coffman brought the application before the governmental Board soley because of of its contract with Rosenberg. Rosenberg's interests were so intertwined with Kirby-Coffman's that the interests of Rosenberg and Kirby-Coffman became one and the same.

This Court has created a prudential requirement that a plaintiff invoking statutory or constitutional protection be "arguably" within the zone of interests which the statute or constitutional provision was intended to protect. In

Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), this Court stated:

> "The question of standing is different [from the issue of merit]. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Data Processing Service Organizations, at 153.

Petitioner brings its complaint under Title 42 U.S.C. §1983, the Fifth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution. Each of these provisions employ extremely expansive language in order to

afford broad protection of individual rights.[1]

Given the inseparability and entanglement of the legal interests of Rosenberg and Kirby-Coffman, Rosenberg's interests are "arguably" within the zone protected under Title 42 §1983 and the Fifth and Fourteenth Amendments to the United States Constitution. The County Board's alleged illegal actions in

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[1]Title 42 U.S.C. §1983 provides in pertinent part: "Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . (emphasis added). The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property without due process of law . . ." The Fourteenth Amendment to the United States Constituion provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

denying the application deprived Rosenberg of the benefit of his bargain causing a "distinct and palpable" injury as contemplated in Allen v. Wright, at 751.

Free v. Landrieu, 666 Fed.2d. 698 (1st Cir. 1981), gave the First Circuit the opportunity to consider analogous facts. There, the Court considered an individual's action which asserted injury based upon the Rhode Island Department of Housing and Urban Development's (RIDCA) refusal to renew the plaintiff's contract with her landlord. New administrative regulations had been enacted causing RIDCA to refuse to take action necessary for renewal of the tenant's lease. The tenant brought suit against RIDCA as a result of RIDCA's failure to approve her

arrangement with the landlord. The Court reasoned:

> "Thus, at the outset of this action there was undoubtedly a 'case or controversy' which was judiciable under Article III of the United States Constitution. Moreover, the controversy was between the defendants (RIDCA and HUD) and not merely the plaintiff's landlord to whose contract the challenged amendment was directed, but also the plaintiff. She would have been an intended third party beneficiary of the proposed contract if RIDCA had been willing to make it, and she was a party to the proposed lease which RIDCA has refused to approve. It is abundantly clear that she has the requisite standing to sue because, though the challenged amendment is not haec verba addressed to her, one of its principal purposes is to affect her and her interests, and it directly and immediately did so." Free at 702.

Rosenberg's position is nearly identical to that of the plaintiff in Free v. Landrieu. The failure of the County Board to grant its approval to Kirby-Coffman's waste-to-energy

application directly and immediately impacted upon Rosenberg's interests.

To deny Rosenberg's standing in the instant case can have no other effect but to deny the forum which was anxiously granted in Free.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2806

FRANK ROSENBERG, INC.,

Plaintiff-Appellant,

v.

TAZEWELL COUNTY, a body politic, JERRY APPENZELLER, JAMES CARIUS, JAMES DAWSON, FRED ERTMOED, KENNETH EUBANKS, THOMAS FABRY, ROBERT B. FORSYTH, ROBERT LUTZ, LARRY NOREUIL, WILMA O'DONNELL, and RALPH PALUSKA, individually and as members of the Tazewell County Board,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 87-1289—Michael M. Mihm, *Judge.*

ARGUED MARCH 29, 1989—DECIDED AUGUST 11, 1989

Before POSNER, FLAUM, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiff-appellant Frank Rosenberg, Inc. (Rosenberg) brought this section 1983 action against Tazewell County, Illinois and individual present and former members of the Tazewell County Board (County Board). At the heart of Rosenberg's complaint is a 1986 County Board denial of a siting permit for a regional pollution control facility. The district court

dismissed the action for lack of standing. Rosenberg filed a timely appeal.[1] We now affirm.

I.
BACKGROUND

A. Facts

In 1985, Rosenberg sought to sell land known as Rosenberg Industrial Park to Kirby-Coffman, Inc. (Kirby). Rosenberg Industrial Park formerly served as a municipal landfill for waste collected in Tazewell County; it is located one mile south of Pekin, in an unincorporated area of Tazewell County. Three letters from Kirby to Rosenberg allegedly form a contract for the sale of Rosenberg Industrial Park at a price of $2,500,000.[2] However, Kirby's

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[1] Although the district court entered a memorandum opinion, it failed to enter a separate judgment pursuant to Federal Rule of Civil Procedure 58. Ordinarily, this separate judgment must be entered before there is a final appealable order over which we may exercise jurisdiction. *See United States v. Indrelunas*, 411 U.S. 216, 221-22 (1973); *Rosser v. Chrysler Corp.*, 864 F.2d 1299 (7th Cir. 1988); 28 U.S.C. § 1291. When a separate Rule 58 judgment has not been entered, however, this court may nevertheless hear the appeal if: "the district court clearly intended that the opinion and order from which an appeal was taken would represent the final decision in the case, a judgment of dismissal was entered in the clerk's docket, and the prevailing party in the district court did not object to the taking of an appeal in the absence of a separate judgment." *Rosser*, 864 F.2d at 1305; *Banker's Trust v. Mallis*, 435 U.S. 381, 387 (1978). All three criteria are satisfied here. *See* Appellees' Br. at 8-11; Reply Br. at 2. Moreover, "it is plain that the complaint will not be amended." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988). Accordingly, we have jurisdiction to hear the appeal.

[2] *See* R.6 at Ex. A, B, & C. According to the complaint, the contract was formed as of the second letter, dated February 14, 1986. *See* R.1 at 4, ¶ 13. Both this letter, and an earlier one dated September 23, 1985, are subject to several explicit conditions. One condition was "successfully completing the necessary contractual

(Footnote continued on following page)

obligation to purchase the land was subject to several conditions precedent, one of which was the signing of a contract, by Kirby or one of its affiliates, to construct or participate in the construction of a waste-to-energy facility or other co-generation facility providing steam or energy. The letters also evidence that the parties understood that no firm funding commitment for such a project was possible until all necessary permits and contracts had been obtained.

The waste-to-energy facility was intended for a ten-acre tract located within Rosenberg Industrial Park. Under the Illinois Environmental Protection Act (the Act), Ill. Ann. Stat. ch. 111½, para. 1001 et seq., the proposed waste-to-energy facility was considered a "regional pollution control facility." *See* Ill. Ann. Stat. ch. 111½, para. 1003.32. Therefore, the proposed facility siting was subject to approval by various state and local authorities. Thus, before Kirby could begin construction on a waste-to-energy facility in satisfaction of a condition precedent to its contract with Rosenberg, it needed approval of the facility site. Kirby petitioned the Illinois Environmental Protection Agency, which gave initial approval to the proposed waste-to-energy facility.

Having cleared this first hurdle, Kirby next submitted an application to the County Board for its approval of the proposed facility location within Rosenberg Industrial Park. That application stated that Kirby had complied with all of the written application and notice requirements of the county board approval provision of the Act, *see* Ill.

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[2] *continued*

arrangements and funding of the planned ethanol production facility." A third letter, dated July 1, 1986, further conditioned the terms of the sale, stating that a third party "has committed *arranging* the funding for the facility *when all the necessary permits and contracts are in place* that assure financial feasibility of the project. *As you know, a firm funding commitment cannot be obtained until that is in hand.*" R.6 at Ex. C (emphasis supplied).

Ann. Stat. ch. 111½, para. 1039.2, and therefore, the proposed facility to accept, handle, and incinerate municipal waste merited County Board approval. On July 21, 1986, the County Board held a public hearing at which Kirby presented oral testimony and written exhibits addressing the six criteria detailed in section 39.2 of the Act. *Id.*

On August 25, the County Board executive committee recommended that the full County Board approve Kirby's siting application. Two days later, however, the full County Board rejected the approval request by a vote of 14-7. On September 25, the County Board reconsidered its vote of August 27, and, by a vote of 11-10, again rejected Kirby's siting application. Voting against the application were defendant County Board members Appenzeller, Carius, Dawson, Ertmoed, Eubanks, Fabry, Forsyth, Lutz, Noreuil, O'Donnell, and Paluska. In conjunction with its September 25 vote, the County Board made findings of fact supporting its denial of the site location. *See* R.1 at Ex. G; *see also* Ill. Ann. Stat. ch. 111½, para. 1039.2(e) ("Decisions of the county board . . . are to be in writing, specifying the reasons for the decision."). Kirby did not appeal the County Board's decision to the Illinois Pollution Control Board or seek a writ of mandamus from the Illinois circuit court.

In a letter dated October 27, 1986, Kirby informed Rosenberg that, due to the County Board's refusal to approve the facility siting application, Kirby had ceased all its efforts relating to the construction of a waste-to-energy facility at the Rosenberg Industrial Park. Accordingly, Kirby and Rosenberg did not consummate the sale of Rosenberg Industrial Park for $2,500,000.

B. Decision of the District Court

Following the breakdown of the sale, Rosenberg brought this section 1983 suit alleging that:

> 29. The refusal of the Tazewell County Board to approve the siting application of Kirby-Coffman, Inc. had no reasonable basis, was against the manifest

weight of the evidence presented to the Board, and was an arbitrary and capricious action that *amounted to a confiscation of the Plaintiff's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution.*

30. The Defendant members of the Tazewell County Board who voted to deny the location request of Kirby-Coffman, Inc., acted in their individual and official capacities in an arbitrary and capricious manner with a deliberate and reckless disregard to the Plaintiff's constitutional rights, and as a consequence the Plaintiff *was deprived of its property in violation of the Fifth and Fourteenth Amendments of the United States Constitution.*

R.1 at 7 (emphasis supplied).

The district court dismissed Rosenberg's complaint for lack of standing. *Frank Rosenberg, Inc. v. Tazewell County*, No. 87-1289 (C.D. Ill. Aug. 31, 1988); R.8 [hereinafter Mem. op.]. In the district court's view, Rosenberg lacked standing because the agreement to purchase "gave rise only to an expectation that the agreement would be consummated," Mem. op. at 11, and therefore did not constitute "injury in fact." *Id.* "[A]t no point," the district court pointed out, did Rosenberg "have any state law interest in the issuance of the permit." *Id.*

II.

ANALYSIS

Before this court, Rosenberg submits that the district court erred in holding that he lacked standing to bring this action. We review *de novo* the district court's determination on standing. *See Waste Management of N. Am., Inc. v. Weinberger*, 862 F.2d 1393, 1396 (9th Cir. 1988). Moreover, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations in the complaint, and must construe the complaint in favor of the

complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

A. The Controlling Principles

The concept of standing has endured a long and difficult developmental period. Just a little more than twenty years ago, in *Flast v. Cohen*, 392 U.S. 83 (1967), Chief Justice Warren, noting his agreement with Professor Freund, described standing as surrounded by "complexities and vagaries"—one of " 'the most amorphous [concepts] in the entire domain of public law.' " 392 U.S. at 98-99 & n.18 (quoting *Hearings on S.2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 465, 498 (statement of Prof. Paul A. Freund)). It would be a mistake, however, for the bench and bar to regard this important concept as an intellectual no-man's land today. Beginning with *Flast*, the last two decades have witnessed significant intellectual refinement of this most important concept, and "standing concepts have gained considerable definition from developing case law." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Supreme Court has identified for our guidance the underlying policy concerns upon which this concept is built; it has also set forth an analysis embodying those policy concerns. It is our task to apply that analysis in the cases before us.

The policy concerns can be stated rather succinctly. In *Flast*, the Supreme Court suggested that courts begin their analysis of a standing problem by recalling that standing is really a conceptual subdivision of a broader jurisdictional requirement—the "case or controversy" requirement of Article III. This constitutional limitation on the power of federal courts embodies, noted the Court in *Flast*, "two complementary but sometimes different limitations." 392 U.S. at 95.

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of

> resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Id. Standing is the aspect of justiciability that focuses on the qualifications of the party bringing the suit; the essence of the inquiry is "whether the litigant is entitled to have the court decide on the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also FMC Corp. v. Boesky*, 852 F.2d 981, 987-88 (7th Cir. 1988); *Freedom From Religion Foundation, Inc. v. Zeilke*, 845 F.2d 1463, 1467 (7th Cir. 1988); *Shakman v. Dunne*, 829 F.2d 1387, 1393 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988); *Peoples Gas, Light & Coke Co. v. United States Postal Serv.*, 658 F.2d 1182, 1188-89 n.3 (7th Cir. 1981). The Supreme Court has mandated that, in undertaking this inquiry, the basic constitutional analysis comprises three elements: "A plaintiff must allege [1] personal injury[, 2] fairly traceable to the defendant's allegedly unlawful conduct and[, 3] likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751; *see also Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (at an "irreducible minimum," a party seeking adjudication in an Article III court must establish "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"); *FMC*, 852 F.2d at 987; *Shakman*, 829 F.2d at 1394.

B. The Principles Applied to this Case

To attain standing in federal district court, the plaintiff need not only have sustained an injury, but an injury *personal* to it. *See Allen*, 468 U.S. at 751; *Freedom From*

Religion Foundation, 845 F.2d at 1467 ("at a minimum the appellants must be able to establish that *they* suffered a distinct and palpable injury as a result of the actions of the City") (emphasis supplied). Here, the record plainly demonstrates that the County Board rejected *Kirby's* application, not Rosenberg's. Under the contractual relationship between them, it is clear that it was Kirby's obligation to attempt to secure the appropriate permits. Indeed, the only expectation that Rosenberg could have had under the agreement was that Kirby would purchase the land if its efforts in securing the permits were successful. This expectation hardly transforms Kirby's lack of success into a "distinct and palpable injury," *Warth*, 422 U.S. at 490, to Rosenberg.

Rosenberg, in an effort to escape the application of this principle, notes that "injury in fact," in the constitutional sense we have employed the term in the foregoing discussion, has been considered sufficiently broad to permit, in some instances, a litigant to assert the rights of another. It notes that, for instance, in *Craig v. Boren*, 429 U.S. 190 (1976), a seller was permitted to assert the right of her customers to purchase beer. *See also Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958-59 (1984) (corporation may assert first amendment rights of charity it represents as a professional fundraiser); *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 242-43 (1983) (hospital may assert rights of patient for payment of recovery costs by city); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 682-85 (1977) (corporation selling contraceptive devices may assert right of potential customers to purchase items).

We cannot accept Rosenberg's submission. Rosenberg is correct in asserting that, in some circumstances, the Supreme Court has permitted a litigant to assert the *rights* of another person. However, the Article III requirement of injury in fact remains and, as we have noted earlier, Rosenberg has not met it. *See Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("The common thread underlying both [constitutional and prudential standing] require-

ments is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.") (footnote omitted).[3] *Cf. Warth*, 422 U.S. at 501 ("Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself . . . .").

Even if Rosenberg met the threshold requirement of a personal injury, it would not be an acceptable litigant for the assertion of Kirby's rights. It is well established that, with regard to a litigant's raising the rights of a third party, federal courts have imposed upon themselves "a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig*, 429 U.S. at 193. Accordingly, federal courts, before permitting third-party standing, have examined closely the relationship of the litigant and the third party to determine whether proceedings conducted by the litigant will fulfill the underlying policy concerns of the standing requirement. The principal concern, of course, is whether "the applicable constitutional questions have been and continue to be presented vigorously and 'cogently.' " *Craig*, 429 U.S. at 194 (quoting *Holden v. Hardy*, 169 U.S. 366, 397 (1898)).

Here, the relationship between Rosenberg and Kirby simply does not ensure that the issue will be argued in such a manner. The defendants' action did not deprive Rosenberg of its land or of any potential customer, other than Kirby. Unlike the beer vendor in *Craig*, whose busi-

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[3] In distinguishing between the nonconstitutional and the constitutional aspects of standing, we have stated that:

> Prudential, or nonconstitutional standing limitations, on the other hand, are "essentially matters of judicial self-governance" designed by courts to avoid abstract questions of wide public significance that are better left to other governmental institutions for resolution.

FMC, 852 F.2d at 987 (quoting *Warth*, 422 U.S at 499-500).

ness was substantially impacted by a continuing ban on an entire class of potential patrons, and the book vendors in *Virginia v. American Booksellers*, 108 S. Ct. 636 (1988), whose business was substantially affected by a law designed to restrict juveniles' access to pornography, Rosenberg does not allege that the County Board's decision will have a continuing impact on its ability to sell Rosenberg Industrial Park. Under the language of the County Board's resolution, proposals for other waste-to-energy facilities are not precluded, nor are alternative uses for the Park. *See* R.1 at Ex. G. Nor does the complaint in any way suggest, whatever the merits of the allegations with respect to the conduct of the defendants, that Rosenberg can present any constitutional challenges with the clarity and comprehensiveness necessary for definitive adjudication. As Judge Posner wrote in *People Organized for Welfare and Employment Rights v. Thompson*, 727 F.2d 167, 173 (7th Cir. 1984):

> Another problem when the immediate injury from alleged misconduct is suffered by someone other than the plaintiff is that the suit may lack, not adversary zeal—that it may have in great abundance—but the concrete factual setting that so concentrates the judicial mind. And, a related point, the ability of the actual victim to protect his legal rights may be impaired by the activity of his self-appointed protectors.

Rosenberg never joined in Kirby's application to the County Board, nor did Rosenberg request that the County Board reconsider its action. Indeed, Kirby shouldered the complete burden of applying to the various authorities for a siting permit. Finally, we note that Kirby suffered from no impediment to the vindication of its own rights, yet it did nothing. Indeed, after the County Board's decision on reconsideration of the application, Kirby did not seek administrative or state-court review, nor did it join in this action brought by Rosenberg in the district court. *See Solomon v. City of Evanston*, 331 N.E.2d 380, 386-87 (Ill. App. Ct. 1975) (mandamus available to review municipal officers' decision). In short, Rosenberg is simply not in

a position to "sharpen[ ] the presentation of issues" and provide "illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).[4]

CONCLUSION

The district court correctly concluded that the plaintiff lacked standing to bring this section 1983 action.[5] Accordingly, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] In determining that Rosenberg has suffered no cognizable injury, we do not imply that Rosenberg necessarily possesses a protectible property interest in the site permit. *See* Mem. op. at 10. The appellant claims that its property interest as a contract seller of land is protected by both the fourteenth, *see* Appellant's Br. at 11, and fifth amendments. *See* Reply Br. at 4. The district court explicitly rejected Rosenberg's due process contention, stating that the Board's denial of Kirby's permit application was, at most, an "indirect deprivation" of Rosenberg's contractual benefit that "does not rise to the level of an unconstitutional property deprivation." Mem. op. at 10. Our disposition makes it unnecessary to address the question.

[5] The individual defendants-appellees also ask this court to determine whether they enjoy absolute immunity. Appellees' Br. at 18. The district court did not reach that issue and our affirmance on the standing issue renders unnecessary our reaching it today.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

FRANK ROSENBURG, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	87-1289
TAZEWELL COUNTY, a body politic, JERRY APPENZELLER, JAMES CARIUS, JAMES DAWSON, FRED ERTMOED, KENNETH EUBANKS, THOMAS FABRY, ROBERT B. FORSYTH, ROBERT LUTZ, LARRY NOREUIL, WILMA O'DONNELL, and RALPH PALUSKA, individually and as members of the Tazewell County Board,	)	
	)	
Defendants.	)	

ORDER

Presently before the Court is the Defendants' Motion to Dismiss. In this pleading, the Defendants assert that the Plaintiff's Complaint should be dismissed on several grounds: (1) the individual board members are immune from suit; (2) the Plaintiff has alleged no property interest which is protected by

the United States Constitution; (3) if the Court finds that the Plaintiff could set forth a viable property interest in the permit in question, the issuance of the permit was within the discretion of the Tazewell County Board; (4) Plaintiff has failed to allege facts sufficient to constitute an unconstitutional taking; and (5) the Complaint fails to state a claim for a violation of due process.

On May 3, 1988, the Court held oral argument on this pending Motion, and all issues were addressed by the parties. However, at the conclusion of the hearing the Court raised the issue of standing. In light of the discussions which took place concerning the existence or non-existence of a property interest, the Court was of the opinion that the primary question to be resolved in this case was none of the issues

identified in the Defendants' Motion to Dismiss, but rather, a question of whether the Plaintiff had standing to bring this claim in the first place.

The parties were directed to submit supplemental pleadings addressing the issue of standing. The parties subsequently submitted supplemental pleadings on this point.

On February 14, 1986, the Plaintiff entered into a contract with Kirby-Coffman, Inc. (hereafter Kirby) to sell to Kirby a 90 acre tract of land for $2,000,500.[1] Kirby's obligation was conditioned on it or its affiliates

---

[1]There appears to be some dispute as to the extent of the Plaintiff's interest in the subject property. The Defendants assert that the Complaint seems to allege that the Plaintiff only owned ten of the 90 acres (see ¶11 of the Complaint), although Plaintiff claims a property interest in the sale of the entire 90 acres (see ¶28A of the Complaint).

"signing a contract to construct or participate in the construction of a waste-to-energy facility or other co-generation facility."

On April 14, 1986, Kirby submitted an application to the Tazewell County Board for a site location suitability permit for a regional pollution control facility on the 90 acres, pursuant to Ill.Rev.Stat., ch. 111 1/2, ¶1039(c), et seq. The statute requires the permit applicant to submit evidence regarding the need for, design of, operation of and affect of the proposed facility. A permit is to issue only if the evidence shows that six statutory criteria are met. (Ill.Rev.Stat., ch. 111 1/2, ¶1039.2).

Expressly, §1039.2 sets forth six elements: (1) the facility was necessary to accommodate the waste needs of

the area; (2) the facility was designed, located and proposed to be operated so that the public health, safety and welfare would have been protected; (3) the facility was compatible with the surrounding area and minimized the affect on the value of the surrounding property; (4) the facility was located outside the 100 year flood plain; (5) the facility was designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and (6) the traffic patterns to and from the facility were designed to minimize the impact on the existing traffic flow.

After the presentation of Kirby's evidence which, the Plaintiff alleges, established that the facility met all six criteria, the individually named elected representatives of the Tazewell

County Board voted against the issuance of the permit to Kirby. On September 25, 1986, the Tazewell County Board issued a written decision finding that four of the six statutory criteria had not been met, and therefore, refused to approve Kirby's petition. Although an appeal process is provided for by Ill.Rev.Stat., ch. 111 1/2, ¶1040.1, Kirby apparently decided not to appeal the decision of the Tazewell County Board. On October 27, 1986, Kirby notified the Plaintiff that due to the Tazewell County Board's refusal to approve the permit, no further efforts would be made by Kirby to establish a waste-to-energy facility on the 90 acre site.

DISCUSSION

The issue of standing arises in the instant case by reason of the fact that

the Plaintiff was not an applicant or co-applicant to the site location suitability permit submitted to the Tazewell County Board. Kirby was the sole applicant.

Further, the record appears to clearly establish that there were several conditions precedent to the execution of a contract between the Plaintiff and Kirby. There is a dispute among the parties as to specifically what these conditions precedent were; however, it is undisputed that they included obtaining a site approval permit from the County Board and obtaining funding for the project. The funding for the project was conditioned upon the acquisition of "all necessary permits and contracts" in order to "assure financial feasibility of the project." (Exhibit C to Plaintiff's

supplemental brief and Plaintiff's supplemental brief p. 1).

The Defendants argue that execution of the Rosenburg/Kirby contract was further conditioned upon: (1) issuance of a construction permit by the Illinois Environmental Protection Agency; (2) signing of a contract for the purchaser of steam energy within one mile of the boundaries of the property; and (3) signing of a contract by Kirby or one of its affiliates to construct or participate in the construction of a waste-to-energy facility. The Defendants argue that site approval was only the first in a long list of hurdles which had to be overcome before Kirby became obligated to the Plaintiff to fulfill the agreement.

The approval of the permit application by the Tazewell County Board was

only one of three methods by which site approval could have been obtained. Site approval could have also been obtained by Kirby taking an appeal of the Tazewell County Board's denial of the permit to the Illinois Pollution Control Board or by seeking a writ of mandamus to the Illinois Circuit Court. Solomon v. City of Evanston, 29 Ill.App.3d 782, 331 N.E.2d 380 (1975). The Defendant asserts that on the basis of these facts it is clear that Plaintiff's claimed injured property interest is merely speculative and does not rise to a protected status under either the Fifth or Fourteen Amendments of the United States Constitution.

A three prong test is applied to determine standing. The Plaintiff must establish: (1) a distinct and palpable injury to the Plaintiff (also referred

to as a single injury in fact or direct injury); (2) that the injury was caused by the challenged activity; and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give. Although the elements in the analysis tend to blend together, the central focus is on the injury requirement. Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d, §3531.4.

It is not sufficient for a plaintiff to establish that the identified interest has been injured. Rather, the plaintiff must also establish that the injured interest is one that the courts recognize for standing purposes. Id.

The standing analysis is not a simple one in that the separation of injury and interest is not always clear. Thus, many courts have found a balancing

test necessary so that the court can balance the injury claimed by the plaintiff with the injured interest alleged. In some instances, standing has been refused even where an injury has been sustained, on the grounds that on balance the interest and other factors counsel against a finding of standing. One of the primary concerns in this balancing test is the protection of federalism. Starbuck v. City and Council of San Francisco, 566 F.2d 450 (1977).

The Plaintiff appears to have asserted two property interests: (1) the regional pollution control facility site permit; and (2) a reasonable expectation that Kirby would have purchased the land under the contract if the board had approved the permit.

First, the Plaintiff argues that its standing to bring this case arises out of §1039.2 of the Environmental Protection Act, which states that a county board "shall" approve the application for a regional pollution control facility upon the showing by the applicant that it has met each of the six criteria set out in §1039.2. Plaintiff has alleged that Kirby's application for the Rosenburg property met each of the six criteria. As a consequence, the County had no discretion to deny the permit. Therefore, the Plaintiff had a legitimate entitlement to the approval of the application for itself, as a landowner.

Second, Plaintiff asserts that his interest in consumating his contract with Kirby was injured by the Tazewell County Board's denial of the permit.

Consequently, the contract could not be executed. Plaintiff was a contract seller of its land; Kirby was the contract purchaser. The permit affected both the Plaintiff and Kirby's property interest. Plaintiff argues that a property interest need not be tangible, but includes a group of rights that arise in relation to the physical property itself, as well as, the right to use, possess and dispose of that property. U.S. v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359 (1945).

As previously noted by the Court, there will be cases where an injury has been sustained, but the injury and/or interest is not sufficient to rise to the level which mandates the Court finding that the party has standing to

proceed. The instant case appears to be such an instance.

As to Plaintiff's alleged property interest in the regional pollution control facility site permit, the Court finds that no sufficient property interest has been alleged.

Ill.Rev.Stat., ch. 111 1/2, ¶1039(c) requires that a permit be issued prior to the construction or operation of a regional pollution control facility. The Plaintiff's Complaint alleges that Kirby applied for such a permit. There is no allegation that the Plaintiff applied for such a permit either singularly or jointly with Kirby.

The Plaintiff has claimed in its Complaint at ¶28B that it has a property interest in the permit itself. However, inasmuch as the Plaintiff did not apply

for the permit, the Court must find that the claimed property interest is unfounded. "[U]nless . . . persons are deprived of their own property, or a common law or statutory right, there is no basis for a claim that government has 'deprived' them of property." (Emphasis added). Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1, 7-8 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1979).

The United States Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) established the standards by which it is to be determined whether or not a party has a property interest in a permit or other governmental benefit. The establishment of a property interest in a permit of governmental benefit requires more than an abstract need or desire for the

benefit, or unilateral expectation of it. Rather, the party must have "a legitimate claim of entitled to it." Board of Regents, 408 U.S. at 577, 92 S.Ct. at 2709.

The Court concurs with the Defendants' position that a permit and license applicant are "entitled" to the governmental permission they seek only when the issuance of that governmental permission is ministerial rather than discretionary. Yehl Auto Parts, Inc. v. Johnson, 593 F.Supp. 329, 332 (Conn. 1984), aff'd 758 F.2d 54 (2nd Cir. 1985). Even if this Court were to interpret Ill.Rev.Stat., ch. 111 1/2, ¶1039.2 to mandate that a permit issued merely because all six statutory criteria had been met, the deciding body must still be granted considerable discretion in coming to a determination

as to whether the criteria have been met. Id.

In the instant case, the board was authorized by §1039.2 to determine such non-qualifiable criteria such as: whether the facility is necessary to accommodate the waste needs of the area it is intended to serve, whether the health, safety and welfare of the public is protected; whether the facility "minimized incompatability with the character of the surrounding area," whether the facility "minimized" the impact on existing traffic flows, and whether the facility "minimized danger to the surrounding area." Further, once the board reaches a decision upon the application for the permit, its decision is subject to review by the Illinois Pollution Control Board. However, the County Board's decision is not to be

overturned unless it is against the manifest weight of the evidence. City of Rockford v. Illinois Pollution Control Board, 125 Ill.App.3d 384, 80 Ill.Dec. 650, 465 N.E.2d 996 (1984).

In this Court's opinion, the real property interest being asserted by the Plaintiff is indirect. The Plaintiff was not an applicant or co-applicant for the site location permit. The Court reads §1039.2 as not precluding the Plaintiff from having been a co-applicant to the permit. His choice not to be the applicant or co-applicant to the permit, gives support to this Court's position that his interest and subsequent injury to that interest are not sufficient to establish the kind of "direct injury" that is required pursuant to a standing analysis.

As to Plaintiff's alleged property interest in the Kirby contract, the Court finds that no sufficient property interest has been alleged. The Plaintiff claims it had a reasonable expectation that it would have received certain contractual benefits from Kirby, if Kirby had received a permit. The Plaintiff's claim is that the denial of Kirby's permit application acted to deprive Plaintiff of its contractual benefit. This type of "indirect deprivation" does not rise to the level of an unconstitutional property deprivation. Investment Annunity, Inc. v. Blumenthal, 609 F.2d 1 (1979).

This Court's reading of the documents involved in creating the contract between the Plaintiff and Kirby is that there were at least six condition precendents to Kirby's obligation to

purchase the property from the Plaintiff. As a result, the Court must find that this agreement between the Plaintiff and Kirby gave rise only to an expectation that the agreement would be consumated. As such, the injury which the Plaintiff now alleges is deemed by this Court to be insufficient to establish "a distinct and palpable injury to himself," "injury in fact," or "direct injury."

The Court recognizes that its analysis of the standing issue has brought into play both traditional elements of standing and a discussion of the property interest itself. However, as previously discussed in this order, these elements frequently blend in such an analysis and are required in reviewing the standing issue.

In sum, the Court finds that the Plaintiff had nothing more than a mere expectation that Kirby would purchase the land when all of the conditions precedent to the agreement were satisfied. The Court also finds that at no point did the Plaintiff have any state law interest in the issuance of the permit. It was Kirby who made application for the permit, and it was Kirby, theoretically, who was injured by the Tazewell County Board's action. Kirby chose not to appeal the Tazewell County Board's denial of the permit or to pursue alternative methods for constructing a waste-to-energy facility on the Rosenburg site. Thus, in this Court's opinion, the Tazewell County Board cannot be said to have unconstitutionally deprived this Plaintiff of any property, in light of the fact that the

Court finds that the Plaintiff had no actionable property interest in the issuance of the permit.

For these reasons, the Court GRANTS the Defendants' Motion to Dismiss on the grounds that the Plaintiff has no actionable property interest in the issuance of the site location permit, and consequently, no standing to bring the instant action.

It is ordered that the Defendants' Motion to Dismiss is GRANTED.

ENTERED: This 31st day of August, 1988.

/S/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

FRANK ROSENBERG, INC., an Illinois Corporation,	)	
Plaintiff,	)	
v.	)	Case No. 87-1289
TAZEWELL COUNTY, a body politic, JERRY APPENZELLER, JAMES CARIUS, JAMES DAWSON, FRED ERTMOED, KENNETH EUBANKS, THOMAS FABRY, ROBERT B. FORSYTH, ROBERT LUTZ, LARRY NOREUIL, WILMA O'DONNELL, and RALPH PALUSKA, individually and as members of the Tazewell County Board,	)	Jury Trial Demanded
Defendants.	)	

COMPLAINT

. . .

TRANSACTIONS

. . .

13. On February 14, 1986, the Plaintiff entered into a contract with Kirby-Coffman, Inc., an Illinois corporation with its principal place of business in Springfield, Illinois, to

purchase the ninety acre tract of land constituting Rosenberg Industrial Park at a purchase price of TWO MILLION, FIVE HUNDRED THOUSAND 00/100 ($2,500,000.00) DOLLARS.

14. Kirby-Coffman, Inc.'s obligation to purchase the land was conditioned upon Kirby-Coffman, Inc., or its affiliates, signing a contract to construct or participate in the construction of a waste-to-energy facility or other co-generation facility providing steam or energy.

15. The waste-to-energy facility was intended to be built on the ten acre tract located within the Rosenberg Industrial Park.

. . .

19. On April 14, 1986, Kirby-Coffman, Inc., pursuant to §1039.2 of the Illinois Environmental Protection

Act, submitted an application to the Tazewell County Board for approval of the location of the waste-to-energy facility to accept, handle, and incinerate municipal waste on the ten acre tract within the Rosenberg Industrial Park.

20. Kirby-Coffman, Inc., and the Plaintiff complied with all of the written application and notice requirements of §1039.2 for the application for approval of the location of the waste-to-energy facility.

On July 21, 1986, the County Board held a public hearing at which Kirby-Coffman, Inc.'s request for approval of the location was heard.

21. During the hearing, Kirby-Coffman, Inc. presented evidence consisting of oral testimony and written exhibits that addressed each of the six

criteria set out in §1039.2 by which the County Board was required to determine whether Kirby-Coffman, Inc.'s location request.

. . .

23. On Monday, August 25, 1986, the executive committee of the Tazewell County Board recommended that the full Board grant Kirby-Coffman, Inc.'s location request.

24. The full County Board on August 27, 1986, rejected the location approval request by a vote of 14-7. . .

25. On September 25, 1986, the Tazewell County Board reconsidered its vote of August 27, 1986, and by a vote of 11-10 the location request was once again rejected. Voting against the location request were Defendant county Board members Appenzeller, Carius, Dawson, Ertmoed, Eubanks, Fabry,

Forsyth, Lutz, Noreuil, O'Donnell, and Paluska. . . .

. . .

27. In a letter dated October 27, 1986 to Bernard Rosenberg, John C. Kirby, of Kirby-Coffman, Inc., informed Frank Rosenberg, Inc. that due to the refusal of the Board to approve the location request, Kirby-Coffman, Inc., had terminated all activity relative to establishing a waste-to-energy facility at the Rosenberg Industrial Park.

. . .

Supreme Court, U.S.
FILED
DEC 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-731

In The

Supreme Court of the United States

October Term, 1989

FRANK ROSENBERG, INC., an Illinois Corporation,

Petitioner,

vs.

TAZEWELL COUNTY, a Body Politic; JERRY APPENZELLER, JAMES CARIUS, JAMES DAWSON, FRED ERTMOED, KENNETH EUBANKS, THOMAS FABRY, ROBERT B. FORSYTH, ROBERT LUTZ, LARRY NOREUIL, WILMA O'DONNELL, and RALPH PALUSKA, Individually, and Members of the Tazewell County Board,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner has a property interest sufficient to support its standing to sue or its claims under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

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No. 89-731

In The

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October Term, 1989

FRANK ROSENBERG, INC., an Illinois Corporation,

Petitioner,

vs.

TAZEWELL COUNTY, a Body Politic; JERRY APPENZELLER, JAMES CARIUS, JAMES DAWSON, FRED ERTMOED, KENNETH EUBANKS, THOMAS FABRY, ROBERT B. FORSYTH, ROBERT LUTZ, LARRY NOREUIL, WILMA O'DONNELL, and RALPH PALUSKA, Individually, and Members of the Tazewell County Board,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is unreported and it appears at pages A12 through A33 in the Appendix to the Petition. The opinion of the Court of Appeals is reported

at 882 F.2d 1165 and the slip opinion is reproduced at pages A1 through A11 in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTE INVOLVED

Illinois Revised Statutes, 1985, Ch. 111½, Par. 1039.2:

"(a) The county board of the county . . . shall approve the site location suitability for such new pollution control facility only in accordance with the following criteria:

(i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;

(ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

(iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

(iv) the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is flood-proofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

> (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents;
>
> (vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows; . . . ."

STATEMENT

As stated in the complaint the respondent "Tazewell County Board is a legislative body vested with the powers and duties imposed upon it by state law and to form the official policies of Tazewell County", Illinois. [Complaint, par. 7]. The individual respondents are the members of the Tazewell County Board who voted against the site location permit constituting a subject matter of this litigation. [Complaint, par. 25 (Petition A37)].

Petitioner, Frank Rosenberg, Inc. (Rosenberg) is the owner of a tract of land in an unincorporated area of Tazewell County, Illinois. By letters from Kirby-Coffman Inc. (Kirby) dated September 23, 1985 and February 14, 1986, Rosenberg claims to have entered into a contract to sell that real estate.[1] In pertinent part the letters state:

> The obligation to purchase the property is conditioned upon and binding in the event that

[1] By affidavit dated May 5, 1988, Rosenberg made those letters a part of the record in the district court. Without the exhibit setting out the legal description of the real estate involved, the letters are reproduced in the Appendix to this Brief. [A1-A4].

> Kirby-Coffman Inc. and/or its affiliates, including members of any consortium of which Kirby-Coffman Inc. is now a member signs a contract to construct or participate in the construction of a waste to energy or other co-generation facility providing steam or energy to a purchaser located within one mile of the boundaries of the property. . . . . [A1].
>
> This letter will confirm our intent to purchase the real estate . . . from Frank Rosenberg, Inc. consisting of 90 acres more or less located in Tazewell County, Illinois *conditioned upon successfully completing the necessary contractual arrangements and funding of the planned ethanol production facility.* [A3 (emphasis added)].

Kirby's planned use of the real estate was for a "regional pollution control facility" within the meaning of the Illinois Environmental Protection Act [Ill.Rev.Stat. 1985, Ch. 111½, Pars. 1001, *et seq.*]. Accordingly, site location approval was required from the Tazewell County Board [Ill.Rev.Stat. 1985, Ch. 111½, Par. 1039.2 (*ante*, 2)].

On April 14, 1986, Kirby applied for site location approval. Rosenberg did not join in the application. After public hearings, a majority of the County Board denied the application on September 25, 1986 and specifically found that the criteria required by paragraph 1039.2 (a) (i), (ii), (iii) and (vi) *ante* 2, had not been met. This decision could have been but was not appealed.[2]

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[2] Illinois holds that a County Board's site approval proceedings are adjudicatory functions [*City of Rockford v. Illinois Pollution Control Board*, 125 Ill.App.3d 384, 465 N.E.2d 996 (1984)]. Ill.Rev.Stat., 1985, Ch. 111½, Par. 1040.1, authorized an

(Continued on following page)

This action was instituted under 42 USC §1983 and alleged *inter alia:*

> 29. The refusal of the Tazewell County Board to approve the siting application of Kirby-Coffman Inc. had no reasonable basis, was against the manifest weight of the evidence presented to the Board and was an arbitrary and capricious action that amounted to a confiscation of plaintiff's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. [Petition, A4-A5].
>
> 30. The Defendant members of the Tazewell County Board who voted to deny the location request of Kirby-Coffman Inc., acted in their individual and official capacities in an arbitrary and capricious manner with a deliberate and reckless disregard of the Plaintiff's constitutional rights and as a consequence the Plaintiff was deprived of its property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. [Petition, A5].

Respondents moved to dismiss on several grounds including the assertions that "the Plaintiff has alleged no

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(Continued from previous page)

appeal to the Illinois Pollution Control Board. The decision of the County Board can only be reversed if the Pollution Control Board finds that it is against the manifest weight of the evidence. [*E. E. Hauling Inc. v. Pollution Control Board*, 116 Ill.App.3d 586, 608, 415 N.E.2d 555 (1983)]. Furthermore, under Illinois law either Kirby or Rosenberg could have brought an original mandamus proceeding in the appropriate Illinois circuit court. [See: *Soloman v. City of Evanston*, 29 Ill.App.3d 782, 331 N.E.2d 380 (1975)].

property interests which is protected by the United States Constitution" and that "the Complaint fails to state a claim for violation of due process." [Petition, A12 & A13]. At the hearing on the motion to dismiss the district court raised the issue of plaintiff's standing to sue and requested supplemental briefs. [Petition, A14].

Citing *Board of Regents v. Roth*, 408 U.S. 564 (1972) [Petition, A26 & A27] the district court "recognize(d) that its analysis of the standing issue has brought into play both traditional elements of standing and a discussion of the property interest itself." [Petition, A31]. It granted the "Motion to Dismiss on the grounds that the Plaintiff has no actionable property interest in the issuance of the site location permit, and consequently, no standing to bring the instant action." [Petition, A33]. *Inter alia*, the district court's "ORDER" states:

> This court's reading of the documents involved in creating the contract between the Plaintiff and Kirby is that there were at least six conditions precedent to Kirby's obligation to purchase the property from the Plaintiff. As a result the court must find that this agreement between the Plaintiff and Kirby gave rise only to an expectation that the agreement would be consummated. As such, the injury which the plaintiff now alleges is deemed by this court to be insufficient to establish 'a distinct and palpable injury to himself', 'injury in fact' or 'direct injury.' [Petition, A30-A31].
>
> ---
>
> In sum, the court finds that the Plaintiff had nothing more than a mere expectation that Kirby would purchase the land when all of the

> conditions precedent to the agreement were satisfied. . . . Thus, in this court's opinion, the Tazewell County Board cannot be said to have unconstitutionally deprived this Plaintiff of any property, in light of the fact that the court finds that the Plaintiff had no actionable property interest in the issuance of the permit. [Petition, A32-A33].

On appeal the Seventh Circuit found that the petitioner lacked standing to sue and affirmed the judgment of the district court. Here again, the court found that there was no "distinct and palpable injury" and stated:

> Here the record plainly demonstrates that the County Board rejected *Kirby's* application not Rosenberg's. Under the contractual relationship between them it is clear that it was Kirby's obligation to attempt to secure the appropriate permits. Indeed, the only expectation that Rosenberg could have had under the agreement was that Kirby would purchase the land if its efforts in securing the permits were successful. This expectation hardly transforms Kirby's lack of success into a 'distinct and palpable injury,' *Warth*, 422 U.S. at 490, to Rosenberg. [Petition, A8].

ARGUMENT

1.

The Decisions Below Are Clearly Correct

Despite Rosenberg's assertions that it was a "contract seller of land" that is not the case and the courts below

are clearly correct in holding that it had no constitutionally protected property interest subject to injury in fact *a fortiori* standing to sue.

Even if it can be said that Rosenberg had standing to sue, its complaint nevertheless failed to state a claim for relief under the Due Process Clause.

The absence of property interest subject to injury in fact also constitutes the absence of a constitutionally protected property interest under the Due Process Clause of the Fourteenth Amendment. "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it." [*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)]. In order to have a legitimate claim of entitlement the claimant " 'must demonstrate an expectation . . . that was legally enforceable, a mutually binding obligation.' (Citations omitted). This expectation must be something which is securely and durably yours under state (or federal . . .) law as distinct from what you hold subject to so many conditions as to make your interest meager, transitory or uncertain." [*Common v. Williams*, 859 F.2d 467, 470 (7th Cir. 1988) quoting from *Upadhya v. Langenberg*, 834 F.2d 661, 665 (7th Cir. 1987) and *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 417 (7th Cir. 1985)].

In this case Rosenberg claims a "reasonable expectation that the Rosenberg Industrial Park would have been purchased for $2,500,000 by Kirby-Coffman." [Complaint, par. 28a.]. But that claim refers to nothing more than 2 letters "subject to so many conditions as to make (its)

interest meager, transitory or uncertain." It is plainly clear that petitioner's "expectation that the Rosenberg Industrial Park would have been purchased for $2,500,000" was nothing more than a subjective and unilateral expectancy not protected by due process.

Even if we further assume that Rosenberg has standing to sue in tandem with a property interest protected by due process, its complaint still fails to state a claim upon which relief can be granted. At best, Rosenberg's federal claim is predicated on substantive due process. As stated in Justice Powell's concurring opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985):

> Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property rights are protected by procedural due process even though the interest is derived from state law rather than the Constitution, Board of Regents v. Roth, 408 U.S. 564, 577, substantive due process rights are created by the Constitution.

Moreover, *Kauth v. Hartford Insurance Co. of Illinois*, 852 F.2d 951, 957 (7th Cir. 1988) holds that state created property rights are not protected by substantive due process "in keeping with the Supreme Court's refusal to 'make the Fourteenth Amendment a font of tort law to be superimposed upon whatsoever system may already be administered by the States'. *Parratt*, 451 U.S. at 544."[3]

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[3] *Parratt v. Taylor*, 451 U.S. 527 (1981).

2.

There is No Conflict of Decisions

Petitioner's singular reason for granting the writ is that the decision below conflicts with the decision of the First Circuit in *Free v. Landrieu*, 666 F.2d 698 (1981). At page 14 of the Petition there is a quote from the *Free* opinion in support of this assertion.

The quoted language is nothing more than gratuitous dicta. Standing to sue was not even an issue in *Free v. Landrieu* and this is obvious from the following quotes from the First Circuit's opinion:

> On June 2, 1980 the defendant filed a motion to dismiss the complaint on the ground that it had become moot since the commencement of the action. On April 3, 1981 the district court granted the motion and dismissed the action and the plaintiff appealed. [666 F.2d at 699].

> The only issue presented to us is whether the district court erred in granting the defendant's motion to dismiss the complaint on the ground of mootness. [666 F.2d at 70].[4]

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[4] The First Circuit affirmed.

CONCLUSION

For the foregoing reasons, and for others implicit therein, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN E. CASSIDY, JR.
CASSIDY & MUELLER
1510 Savings Center Tower
Peoria, Illinois 61602
Telephone: 309/676-0591

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Assistant State's Attorney
Tazewell County Courthouse
Pekin, Illinois 61554
Telephone: 309/477-2205

Attorneys for Respondents.

APPENDIX

KCInc

Kirby-Coffman, Inc.
842 South Second Street Springfield, Illinois 62704
(217) 522-2388

September 23, 1985

Mr. Bernard Rosenberg
P.O. Box 519
Pekin, Illinois 61555-0519

Dear Mr. Rosenberg

This will confirm our agreement to purchase property owned by Frank Rosenberg, Inc. lying between Route 29 and the Chicago and Northwestern Railroad in Section 9, Township 24 North, Range 5 West, Cincinnati Township, Tazewell County, Illinois (the property).

The obligation to purchase the property is conditioned upon and binding in the event that Kirby-Coffman, Inc. and/or its affiliates, including members of any consortium of which Kirby-Coffman, Inc. is now a member, signs a contract to construct or participate in the construction of a waste to energy or other co-generation facility providing steam or energy to a purchaser located within one mile of the boundaries of the property. The purchase price will be $25,000 per acre, payable within 15 days of the signing of the contract referred to in the preceding sentence. Frank Rosenberg, Inc. shall simultaneously convey the property to Kirby-Coffman, Inc., or its designee, by good and sufficient warrant deed, subject

to easements and restrictions now of record. Kirby-Coffman, or its designee shall have 15 days from the transfer of title to object to any defects in title and you shall have a reasonable time, not less than 30 days, to cure any such defects.

As further consideration for this agreement, Frank Rosenberg, Inc. grants Kirby-Coffman, Inc. a right of first refusal to purchase the property for one year from the date of this letter. During such period if Rosenberg receives an offer from a third party to purchase the property, he shall convey the terms of such offer in writing to Kirby-Coffman, Inc., who shall have 15 days to match the terms of the offer and purchase the property. If Kirby-Coffman, Inc. does not purchase the property within the 15 days period, Rosenberg shall be free to sell the property to the third party.

Mr. Bernard Rosenberg
September 23 1985
Page 2

In addition to and as a part of this Agreement, Kirby-Coffman, Inc. agrees to pay Bernard Rosenberg a consulting fee for assistance in developing a waste to energy facility an amount equal to One Hundred Thousand Dollars ($100,000) for each Tri-Mo-Gen module built by Kirby-Coffman, Inc. and affiliates. A Tri-No-Gen facility is described as a waste to energy unit producing 600,000,000 pounds of steam per year. This consulting fee agreement is applicable to waste to energy facilities developed in Tazewell County only by Kirby-Coffman, Inc.

Please acknowledge your acceptance of this Agreement in the space provided below.

KIRBY-COFFMAN, INC.

BY /s/ John L. Kirby
Its President

FRANK ROSENBERG, INC.

BY /s/ John L. Kirby
Its President

DATE 9-23-85

KCInc

Kirby-Coffman, Inc.
842 South Second Street Springfield, Illinois 62704
(217) 522-2388

February 14, 1986

Mr. Bernard Rosenberg
P.O. Box 519
Pekin, Illinois 61555-0519

Dear Bernard,

This letter will confirm our intent to purchase the real estate described on the attachment labeled #1 from Frank Rosenberg, Inc. consisting of 90 acres more or less located in Tazewell County Illinois conditioned upon successfully completing the necessary contractual arrangements and funding of the planned ethanol production facility. The agreed purchase price is Two Million Five

Hundred Thousand Dollars payable when the first funds for the planned project are available for distribution.

A new corporation to be known as Kirby-Coffman Tazewell is being chartered as the Special Purpose Corporation for the project and will be the entity through which funds will flow, titles and permits will be held.

The consulting fee agreement set out in the September 23, 1985 land purchase agreement remains in full force and effect when and if Kirby-Coffman Tazewell constructs a Tri-Mo-Gen facility on the above described property.

Please acknowledge your acceptance of this update of our original agreement dated September 23, 1985.

Sincerely,
/s/ John L. Kirby, Pres.
John L. Kirby, President
Kirby-Coffman, Inc.

/s/ Bernard Rosenberg
BERNARD ROSENBERG FOR
FRANK ROSENBERG, INC.

JLK:bjd